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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³
Debtors.

Affects:

- ☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**SECOND OMNIBUS OBJECTION
OF USACM TRUST TO PROOFS OF
CLAIM BASED, IN WHOLE OR IN
PART, UPON INVESTMENT IN
THE 3685 SAN FERNANDO ROAD
PARTNERS LOAN**

Date of Hearing: August 21, 2009
Time of Hearing: 9:30 a.m.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing the Proofs of Claim filed by individual investors ("Direct Lenders")

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 21, 2007.

1 against USA Commercial Mortgage Company (“USACM”) to the extent such claims are
2 based upon an investment in the 3685 San Fernando Road Partners Loan (the “San
3 Fernando Loan”). This Objection is supported by the Court’s record and the Declaration
4 of Edward M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the
5 Investment in the 3685 San Fernando Road Partners Loan filed with the Court today (the
6 “Burr Decl.”).

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. BACKGROUND**

9 1. On April 13, 2006 (“Petition Date”), USA Commercial Mortgage Company
10 (“USACM”), USA Securities, LLC, USA Capital Realty Advisors, LLC, USA Capital
11 Diversified Trust Deed Fund, LLC, and USA Capital First Trust Deed Fund, LLC
12 (collectively, the “Debtors”), filed voluntary petitions for relief under chapter 11 of the
13 Bankruptcy Code. Debtors continued to operate their businesses, if any, as debtors-in-
14 possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtors’ post-
15 petition management of the Debtors was under the direction of Thomas J. Allison of
16 Mesirow Financial Interim Management, LLC (“Mesirow”), who served as the Chief
17 Restructuring Officer.

18 2. USACM is a Nevada corporation that, prior to the Petition Date, was in the
19 business of underwriting, originating, brokering, funding and servicing commercial loans
20 primarily secured by real estate, both on behalf of investors and for its own account.

21 3. That business included the solicitation of individual investors to purchase
22 fractional interest in loans that USACM originated and then serviced. These investors,
23 totaling approximately 3,600 as of the Petition Date, are referred to as “Direct Lenders” in
24 USACM’s bankruptcy case and in this Objection.

25 4. On September 14, 2006, the Court entered its Order Setting Deadline to File
26 Proofs of Claim and Proofs of Interest [Docket No. 1280] (the “Bar Date Order”). The

1 Bar Date Order established 5:00 p.m., prevailing Pacific Time, on November 13, 2006, as
2 the deadline (“Bar Date”) for creditors to file proof of claims.

3 5. On September 25, 2006, Debtors served a copy of the Bar Date Order on
4 their service lists [Docket No. 1358]. All Creditors were served with a copy of the Bar
5 Date order as well [Docket No. 1358].

6 6. On November 6, 2006, a stipulation was filed and an order entered extending
7 the Bar Date for Direct Lenders only to file proofs of claim until January 13, 2007 [Docket
8 No. 1729].

9 7. On January 8, 2007, this Court entered its Order Confirming the “Debtors’
10 Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No.
11 2376] (the “Confirmation Order”).

12 8. As part of the Plan, USACM sold the servicing rights to most of the loans it
13 serviced, including the San Fernando Loan, to Compass Partners, LLC. The sale to
14 Compass Financial Partners closed on February 16, 2007.

15 9. Silar Advisors alleges that it has foreclosed on its loan(s) to Compass
16 Financial Partners in September 2008 and alleges that it has become the successor servicer
17 to the San Fernando Loan and the Direct Lenders thereto.

18 10. Under the Plan, the USACM Trust is the successor to USACM with respect
19 to standing to seek allowance and disallowance of Claims.

20 11. Under the Plan, unsecured claims of Direct Lenders against USACM are
21 classified in Class A-5. Allowed Unsecured Claims “shall receive a beneficial interest in
22 the USACM Trust, and on account of their Allowed Claim may receive a Pro Rata Share
23 of the assets of the USACM Trust after satisfaction of all Allowed unclassified Claims,
24 Allowed Class A-1, A-2, and A-3 Claims, and all post-Effective Date fees, costs, and
25 expenses of implementation of the USACM Plan for USACM and the USACM Trust.”
26

1 12. The USACM Trust exists as of the Effective Date of the Plan, which was
2 March 12, 2007. Geoffrey L. Berman is the Trustee.

3 13. **Exhibit A** attached, lists Proofs of Claim filed by Direct Lenders that appear
4 to be based, in part, upon an investment in the San Fernando Loan. (Burr Decl. ¶ 7.)
5 **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's address, the
6 total amount of the claim and the total amount of the claim that appears to be related to an
7 investment in the San Fernando Loan based upon the information provided by the
8 claimant. (Burr Decl. ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as
9 the San Fernando Claims.

10 **II. JURISDICTION**

11 14. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334
12 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
13 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

14 15. The statutory predicates for the relief requested herein are 11 U.S.C. § 502
15 and Bankruptcy Rule 3007.

16 **III. APPLICABLE AUTHORITY**

17 16. Under the Bankruptcy Code, any Claim for which a proof of claim has been
18 filed will be allowed unless a party in interest objects. If a party in interest objects to the
19 proof of claim, the Court, after notice and hearing, shall determine the amount of the
20 Claim and shall allow the Claim except to the extent that the Claim is "unenforceable
21 against the debtor . . . under any . . . applicable law for a reason other than because such
22 claim is contingent or unmatured." 11 U.S.C. § 502(b).

23 17. The USACM Trust is entitled to object to proofs of claim under 11 U.S.C.
24 § 502(a). This objection is timely under the confirmed Plan, as the deadline for such
25 objections has been extended to October 7, 2009, by this Court's orders.
26

18. A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof of claim controverts the presumption, the creditor ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996). The ultimate burden of proof as to the validity of a proof of claim “remains at all times upon the claimant.” *Lundell v. Anchor Constr. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039 (9th Cir. 2000).

IV. THE SAN FERNANDO LOAN DIRECT LENDERS

19. On August 2, 2005, 3685 San Fernando Road Partners, L.P. made and delivered to various lenders, including the Direct Lenders identified in Exhibit A, a Promissory Note, in an amount of \$6,825,000 (the “Note”). Through subsequent amendments of the Note and underlying Loan Agreement, the loan amount was ultimately increased to \$7,350,000.

20. The San Fernando Loan is secured by a Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (“Deed of Trust”) on real property and improvements thereon, as described in the Deed of Trust. The Deed of Trust was recorded on August 8, 2005 at Instrument No. 051882445 in the Official Records of the Los Angeles County Recorder’s Office.

21. Upon information and belief, the San Fernando Loan was fully secured at the time of the loan and was fully secured at the time USACM’s servicing rights were sold to Compass Partners.

22. The property securing the San Fernando Loan had an approximate value of \$6,230,000 as of July 6, 2006, and had an approximate value of \$7,000,000 to \$7,500,000 as of August 3, 2007.

23. The San Fernando Loan defaulted on June 1, 2006.

V. THE OBJECTIONS

24. The Direct Lenders fail to state a claim as the Direct Lenders have not been damaged by USACM. Pursuant to information from Silar Advisors, the Direct Lenders are owed the following as of July 1, 2009:

\$1,822,631	Principal
\$1,854,646	Accrued Interest
\$103,895	Service Fees
\$872,257	Default Interest
\$513,136	Late Fees
\$183,750	Exit Fee
<u>\$183,750</u>	<u>Extension Fee</u>
\$5,534,065	Total of above

It should be noted that the loan has been repaid though there currently sits more than \$1.8 million in escrow subject to the proceedings in the District Court litigation 3685 San Fernando Road Partners, L.P v. Compass Financial Partners et al (Case Number 3:2007 CV00241) pending in this District in front of Judge Robert Jones. Allocation of the escrowed funds between default interest, service fees, contract interest and the costs of the Receiver appointed in that matter remain to be resolved.

25. The Direct Lenders fail to state a claim as USACM has not breached the servicing contract. USACM was under no duty to foreclose on the property securing the San Fernando Loan though a Notice of Default was sent to the Borrower and guarantors during the pendency of the USACM bankruptcy and prior to the sale of the servicing rights to Compass Financial Partners. To the extent the property's value has dropped since USACM sold the servicing rights pursuant to the Plan of Reorganization, USACM is no longer a party to any servicing contract and consequently has no rights, duties, or obligations thereunder.

26. USACM did not guarantee the Direct Lenders investment in the San Fernando Loan. The Direct Lenders took a known risk by investing. Accordingly, USACM is not liable for the Borrower's default or any decrease in the value of the collateral.

VI. CONCLUSION

The USACM Trust respectfully requests that the Court disallow the claims listed in **Exhibit A** to the extent those claims are based upon a Direct Lender investment in the San Fernando Loan. The USACM Trust also requests such other and further relief as is just and proper.

Dated: July 21, 2009.

LEWIS AND ROCA LLP

By /s/ Marvin Ruth (#10979)

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Copy of the foregoing mailed by first class postage prepaid U.S. Mail on July 21, 2009 to all parties listed on Exhibit A.

LEWIS AND ROCA LLP

/s/ Carrie Lawrence
Carrie Lawrence